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In the Supreme Court of the United States

OCTOBER TERM, 1993

BLAKE CONSTRUCTION COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the specific terms of petitioner's contract with the government did not call into play the warranty recognized by this Court in *United States* v. *Spearin*, 248 U.S. 132 (1918).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 26-34) is reported at 987 F.2d 743. The opinion of the United States Claims Court, now the Court of Federal Claims (Pet. App. 1-25), is reported at 25 Cl. Ct. 177.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1993. A petition for rehearing was denied on April 13, 1993. Pet. App. 35-36. The petition for a writ of certiorari was filed on July 12, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner and the United States Department of the Navy entered into a $98.4 million fixed-price contract to build medical facilities at the San Diego Naval Regional Medical Center. Pet. App. 1-2, 26-27. The contract provided for the construction of four buildings connected by a corridor measuring approximately 14 feet high, 18 feet wide, and 1,000 feet long, designed to move people, supplies, and utilities (heat, water, and electricity) within the buildings. *Id.* at 3-4, 27. Petitioner entered into a $10.2 million subcontract with Steiny and Company, Inc. (Steiny) for all electrical work on the project. *Id.* at 2.

The electrical work on the project included the installation of an electrical feeder system, by which electricity entered the facility via high-voltage lines, was reduced to lower voltages by transformers, and was distributed throughout the buildings by a network of increasingly smaller lines conveyed by electrical conduits. Pet. App. 2-3, 27. The contract drawings depicting the electrical feeder system showed the necessary conduits overhead along the west side of the corridor, suspended from utility racks, either exposed or hidden from view by a dropped ceiling. *Id.* at 14, 27. These drawings included notes which advised that the illustrations were "diagrammatic," *i.e*, not scaled to an exact location, and the notes on some drawings stated, "Contractor shall relocate any/all conduits as per existing conditions to coordinate with all other trades." *Ibid.*

Before construction of the corridor commenced, Steiny dug a trench along the planned path of the corridor and began installing the electrical feeder system in an underground concrete duct bank. Pet. App. 4, 28. The Navy issued a stop work order advising petitioner that the underground electrical system did not conform to

contract requirements as shown in the drawings. *Id.* at 4-5, 28. The Navy directed that the underground system be removed. *Id.* at 4-5. Petitioner advised the Navy that it considered this directive to be a constructive change in the contract for which it was entitled to additional compensation. *Id.* at 5. The Navy refused to change its position, and Steiny removed the underground duct bank under protest. *Ibid.*

Subsequently, a conflict over space in the overhead area developed with the mechanical subcontractor. After advising the Navy of the problem, petitioner directed Steiny to install the electrical conduits along the east side of the corridor's ceiling, rather than the west side as shown in the drawings, and the mechanical subcontractor installed plumbing along the west side. Pet. App. 5-6. In two locations, the electrical conduits were placed outside the corridor, and in other places it was necessary to weave them around mechanical conduits or pipes. *Id.* at 6.

Petitioner later submitted a claim under the Contract Disputes Act of 1978, 41 U.S.C. 601-613 (1988 & Supp. III 1991), for $1,136,089, which it claimed as the additional costs for relocating the electrical system from underground to overhead. Pet. App. 6-7, 28-29. The Navy denied this claim, and petitioner filed this action in the Claims Court. *Id.* at 29.

2. The Claims Court held that petitioner was entitled to an equitable adjustment of $1,679,260, plus interest. Pet. App. 1-25. That court concluded that the contract permitted the contractor to place the electrical feeder conduit in an underground duct bank, and that the Navy's order to relocate it overhead was an arbitrary constructive change in the contract. *Id.* at 8, 10-16. In the court's view, the drawings showing the system located overhead were "performance specifications" that set forth an objective or standard to be achieved but which left the

manner for achieving that result to the contractor. *Id.* at 10-13. The court rejected the government's position that the contract contained "design specifications" for the electrical feeder system that prescribed the precise manner in which the work was to be performed. *Ibid.* The court found that Steiny's proposed underground system was not only reasonable, but, in fact, superior to an overhead system in terms of safety, feasibility, and cost. *Id.* at 15-21. The court therefore awarded petitioner its additional costs for relocating the system. *Id.* at 21-24.

3. The court of appeals reversed. The court noted that the "central question in this case is whether the contract gave [petitioner] discretion to choose an underground location for installing the electrical feeder system," Pet. App. 29, an issue of contract interpretation that the court reviewed *de novo*. *Id.* at 32. In the court's view, the decisive issue was not whether the dispute should be characterized as involving "performance" or "design" specifications, but whether the contract should be interpreted to give petitioner unfettered authority to install the electrical feeder system underground, rather than doing so overhead. *Id.* at 30-32. While the notes to the contract drawings provided petitioner some discretion to avoid conflicts with other trades, the court held that "[a]ll the drawings depicted overhead installation of the electrical conduits," and "[a]n interpretation permitting underground installation renders these drawings meaningless." *Id.* at 32-33. The court of appeals accordingly concluded that petitioner was not entitled to additional compensation for relocating the conduits overhead. *Id.* at 34.

ARGUMENT

1. Petitioner first contends (Pet. 17-25) that the court of appeals' decision conflicts with *United States* v.

Spearin, 248 U.S. 132 (1918), which held that the government impliedly warrants the adequacy of its contract specifications. That claim does not warrant further review.

The essence of petitioner's claim (Pet. 20-22) is that it is entitled to compensation for the costs incurred in relocating the conduits from the west wall to the east wall, because the contract drawings that showed the electrical conduits along the west wall required an impossible task in that they depicted the conduits as fitting entirely within the corridor (where they would interfere with other utilities). The defect in that argument is that the claim advanced by petitioner below addressed a different matter. Petitioner sought (Pet. App. 5, 6-7, 28-29) and the Claims Court awarded (*id.* at 8, 21-22, 29) damages for the increased costs of moving the feeder system from the underground trench to an overhead location. Petitioner never filed an administrative claim seeking an equitable price adjustment based on any additional expenses it may have incurred in moving the system from the west wall to the east wall of the corridor, well after the Navy ordered petitioner to comply with the original drawings showing that the feeder system should not be placed underground. Absent such a claim, the courts below lacked jurisdiction under 41 U.S.C. 609 to consider any such damages. *Dawco Constr., Inc.* v. *United States*, 930 F.2d 872, 877 (Fed. Cir. 1991).

2. To the extent that petitioner continues to press its claim for the costs it incurred in connection with its initial decision to place the conduits in an underground trench, the court of appeals correctly concluded that the fact that the original drawings could not be followed in every detail did not relieve petitioner of the obligation to install the conduits overhead. Pet. App. 30-31. As the court explained, "common sense dictates that the contractor does not acquire unfettered discretion to com-

plete the contract in any manner it sees fit, just because one aspect of the specification might be defective." *Id.* at 31. Instead, under established precedents, petitioner's remedy was to bring the flaws in the specifications to the government's attention, proceed under its direction, and then seek an equitable price adjustment. See *S.W. Electronics & Mfg. Corp.* v. *United States*, 655 F.2d 1078 (Ct. Cl. 1981); *J.L. Simmons Co.* v. *United States*, 412 F.2d 1360 (Ct. Cl. 1969). Petitioner's unilateral decision to place the feeder conduits underground at the outset did not satisfy those requirements.

3. There is no merit to petitioner's related contention that the court of appeals improperly reversed the Claims Court's factual finding that performance was impossible without determining that that finding was clearly erroneous. Pet. 28. The court of appeals made clear that it did "not revisit the Claims Court's factual findings to reach [its] conclusion." Pet. App. 33. The court merely held that the Claims Court committed a legal error when it interpreted the contract's provision granting petitioner limited discretion to accommodate conflicts with other trades as encompassing the authority to relocate the feeder system from an overhead location to an underground duct—an interpretation that, as the court of appeals correctly noted (*ibid.*), would have rendered meaningless other provisions of the contract. The court of appeals' treatment of that issue is consistent with the well settled principle that the interpretation of a contract generally is a question of law. *Beta Systems, Inc.* v. *United States*, 838 F.2d 1179, 1183 (Fed. Cir. 1988); 3 A. Corbin, *Corbin on Contracts* § 554 (1960); 4 S. Williston, *A Treatise on the Law of Contracts* § 616 (3d ed. 1961). The court of appeals' application of that principle to this case does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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